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Supreme Court, U.S.
FILED

No. 00 999 DEC 18 2000

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In The

Supreme Court of the United States

WILLIAM G. WARD d/b/a
BOURBON STREET SOUTH,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

Is Orange County's definition of "Adult Performance Establishment" facially unconstitutional because it shifts the burden of proof to Mr. Ward to prove that the statements, conversations and advertisements at his business establishment, Bourbon Street South, are protected by the First Amendment?

Can this Court's First Amendment/zoning jurisprudence be expanded to encompass those businesses which offer fully-clothed dance entertainment rather than nude or semi-nude entertainment?

Is Orange County's definition of "sexual stimulation," which includes the words "prurient interest," unconstitutionally vague, and, moreover, is it overbroad because one of its effects is to restrict the pure speech rights of patrons and workers at Bourbon Street South?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically Orange County, Florida and William G. Ward.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, William G. Ward, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Ward v. County of Orange*, 217 F.3d 1350 (11th Cir. 2000) (App. A). The opinion of the District Court is published at *Ward v. County of Orange*, 55 F.Supp. 2d 1325 (M.D. Fla. 1999) (App. B).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on July 13, 2000 (App. A). The Court of Appeals denied a timely petition for rehearing on September 18, 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment One to the United States Constitution states in pertinent part, "Congress shall make no law- . . . abridging the freedom of speech, . . . " Amendment Five provides in relevant part, "no person shall . . . be deprived of life, liberty, or property, without due process

of law; . . . " Both of these provisions are applicable to the states through the Fourteenth Amendment to the United States Constitution which provides in part, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

A. Introduction

This case presents a number of constitutionally significant issues. The primary question is whether Orange County can shift the burden of proof (in either a licensing or criminal context) to Mr. Ward thereby requiring him to prove that the statements, conversations and advertisements at his business are not "sexually stimulating." Under the Orange County Adult Entertainment Code, if the conversations or advertisements at Bourbon Street South (hereinafter "BSS" or "Bourbon Street") are "sexually stimulating," the business must comply with the county's adult zoning and separation requirements – which it does not. The result is effective and total censorship.

Second, this case presents a novel scenario addressing whether this Court's adult entertainment zoning jurisprudence can be used as a springboard to require businesses that do *not* offer nude or semi-nude dancing to comply with adult entertainment regulations, including zoning requirements.

Finally, questions arise whether this unique ordinance is unconstitutionally overbroad, vague and violates Mr. Ward's commercial speech-advertising rights.

B. Facts

Prior to this litigation, Mr. Ward had been operating Bourbon Street South in Orange County, Florida for approximately ten years (R10-189). In January and March, 1998 numerous arrests[1] and threats were made at BSS by the county's law enforcement arm, the Metropolitan Bureau of Investigation (hereinafter "M.B.I."). Most of these charges were for operating an adult entertainment establishment without an adult entertainment license (R1-36-22; R2-45-55; R7-124-12; R8-139-12). The arrests occurred because M.B.I. officers and other county agents believe that Ward's business constitutes an "adult performance establishment" as defined at Section 3-6(1)(c) and (d) and 3-6(2) of the Orange County Adult Entertainment Code. (App. D). The applicable sections of the ordinance provide:

> **"Adult performance establishment"** shall mean as follows:
>
> (1) An establishment where any worker:
>
> (c) Offers, solicits, or **contracts to dance or perform** with a customer in consideration for or accepts any tip, remuneration or compensation from or on behalf of that customer: or[2]

---

[1] It was in response to these arrests and the instant dispute that Ward filed his lawsuit.

[2] Ward is *not* challenging subsections (a) and (b) of the ordinance.

(d) **Dances or performs with or within three (3) feet of a customer** in consideration for or accepts any tip, remuneration or compensation from or on behalf of that customer.

(2) This definition is *not* intended to apply, and it is an *affirmative defense* to an alleged violation of this chapter regarding operating an adult performance establishment without a license, if the **alleged violator demonstrates** either **(a)** that the establishment is a bona fide private club whose membership as a whole engages in social nudism or naturalism as in a nudist resort or camp, or **(b)** that the *predominant business or attraction* of the establishment is not the offering to customers of a product, service, or entertainment which is intended to provide *sexual stimulation or sexual gratification* to such customers, and the establishment *and its advertising* is not distinguished by an emphasis on or the promotion of matters or persons depicting, describing, displaying, exposing, simulating, or relating to specified sexual activities or specified anatomical areas.[3]

App. D, (Emphasis added).

After the lawsuit was filed the county amended its ordinance by providing definitions for sexual stimulation and sexual gratification. Those definitions provide:

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[3] The code also provides a definition of "specified anatomical areas" and "specified sexual activities." These definitions are *not* being challenged by Mr. Ward.

> Sexual stimulation means either to excite or arouse the prurient interest *or* to offer, propose, solicit or suggest to provide an act of sexual gratification to a customer, **including but not limited to all conversations, statements, advertisements** and acts which would lead a reasonable person to conclude that an act of sexual gratification was to be provided.
>
> Sexual gratification means the engaging in or committing of an act of sexual intercourse, oral-genital contact, masturbation, *or* the touching of the *covered* or uncovered sexual organ, pubic region, buttock, breast, chest or inner thigh of a person, any of which is for the purpose of **arousing or gratifying the sexual desire** of another person. (Emphasis added).

If a person operates an "Adult Performance Establishment" without an adult entertainment license, he can be subjected to a possible sixty-day jail term. See Section 3-127, Orange County Code.

If Bourbon Street is in fact an "adult performance establishment," the business is effectively closed because it does not meet the county's zoning and separation requirements – even though it has been in business at the same location for ten years. See generally Section 3-76, Orange County Code [distance-zoning requirements].

As set forth above, the adult-performance-establishment definition focuses on the statements and conversations at BSS and the signs that advertise BSS. Pursuant to the definition, if patrons and dancers talk in a sexually suggestive or flirtatious manner, that is enough to trigger the county's zoning restrictions. The following quotes from an M.B.I. agent illustrate this point.

Q. If the two people who are talking about sex are just doing it for fun, and they don't really have any intent on having sexual intercourse, could that still constitute sexual stimulation under the code that we are talking about?

(Objection omitted).

A. Partially, possibly.

Q. Why?

A. Because it says conversations, statements, suggestions to provide an act of sexual gratification . . .

Parker deposition at p. 49-50 (R8-126).

* * *

Q. How about if we were just flirting and it was banter?

(Objection omitted).

A. I would say it would be part of it. You would need the totality of the situation to determine whether or not it was sexually stimulating.

Parker deposition at p. 49 (R8-126).

In its answer brief to the circuit court, the county conceded that a sexually suggestive comment is a factor in determining whether the "affirmative defense" can be proven by a defendant or license applicant.

> A sexually suggestive comment, without more, by a worker to a customer is merely one factor to be considered when determining whether a business meets the affirmative defense found in this definition.

See page 39 of County's Answer Brief.

The county has focused upon customers' conversations because BSS sells party tickets which entitle customers to "x" amount of "chat time" with a performer of their choice. (R1-6-2) In other words, customers buy tickets to sit and talk with performers. It is during this "chat time" that the customers and performers engage in sexual banter with one another. Mr. Ward described the business practice in the following manner:

> If the customer buys a package he gets a complimentary bottle or carafe of non-alcoholic wine or champagne, party hats and chat tickets ranging from 1 (lowest) to 14 (highest) redeemable for $5. per ticket. Anyone can redeem these tickets on the night of purchase including the purchaser. A package allows a customer to sit, talk and "party" with a hostess.

Affidavit of Bill Ward dated May 1, 1998 (R1-6-2).

Bourbon Street's "menu" also reflects the practice of purchasing chat time tickets. "One Blue ticket is good for 10 minutes of Party or Chat time." (R1-5-18; R1-6-2). The M.B.I. has attempted to place a sinister spin on the practice.

> In actuality, experience shows that the workers in **Bourbon Street South** will say anything it took to sell slow dances to customers, and encourage them to buy drink packages. The experience of undercover agents, and the testimony of former workers, has demonstrated that the female workers are instructed to say things to customers that are sexually suggestive, such as, *"Tell me your sexual fantasies."*

Affidavit of Paul M. Winsett, page 14 (R1-33-16; R2-43) (Emphasis added).

Regardless of how the practice is characterized, under the county's scheme sexual innuendo can be "sexually stimulating" – which, again, can trigger the zoning requirements set forth within Section 3-76 of the Orange County Adult Entertainment Code.

The dancers at BSS wear an assortment of clothing, ranging from hot pants, swimsuits, skirts, long dresses and **some performers even wear pants** (R1-6-1; R7-120-2; R7-122-2; R7-123-2). The entertainers dance with customers and individually *on and off stage*[4] (R1-6-2-3; R7-120-2). Ward attempted to compromise with the county by having his attorney meet with the county agents to alleviate their concerns by instituting a **uniform dress code**, either *long skirts or long dresses* (R1-6-1; R7-124-3). "By using the term long dresses or skirts, I mean that the dresses would fall below the entertainer's knees" (R7-120-2). Later, a county attorney issued a memorandum to the Orange County Commission stating that it is irrelevant (for constitutional and adult code purposes) whether a dancer is nude, semi-nude *or fully clothed* (R8-141-42).

Despite the rhetoric of the county's agents, there has *never* been an arrest for any type of illegal, sexual conduct such as prostitution, lewdness or anything similar in BSS's ten-year history (R7-124-7; R7-120; R7-123).

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[4] Numerous photographs of the business premises including the dance stages, exterior signs, etc. are included in the record (R1-15).

C. Procedure

Mr. Ward's lawsuit sought a judgment declaring that the definition of Adult Performance Establishment was unconstitutional as well as an injunction enjoining its enforcement. The district court granted the county a summary judgment and found that the ordinance was facially constitutional. The district court ruled that if nude dancing has only minimal protection under the First Amendment, then fully-clothed dancing has only minimal protection.

> Counsel for Mr. Ward suggests that this case is different from all other reported adult entertainment cases holding that reasonable zoning restrictions are constitutional because the dancers at Bourbon Street perform, according to Mr. Ward, *fully clothed*. Because of this distinction, Mr. Ward believes that he should not be subject to zoning restrictions applicable to establishments in which dancers perform *without clothes*.
>
> * * *
>
> n. 9 Counsel for Mr. Ward stated that "there is not one case that counsel is aware of that holds that the secondary effects doctrine applies to fully clothed dancing" See Doc. No. 147 at 8.
>
> * * *
>
> The first inquiry in analyzing a freedom of speech question is whether the activity sought to be regulated is protected by the First Amendment. (citation omitted). The Eleventh Circuit has held that nude dancing is entitled to "some degree of First Amendment protection. (citation omitted). **Thus, for the purposes of the present**

> **case, the court will assume that fully-clothed dance performances are entitled to "some degree" of First Amendment Protection also.** See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981) (striking down ordinance that attempted to ban all live entertainment within its jurisdiction). However, such performances involve only the "barest minimum of protected expression." See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 45 L.Ed.2d 648, 95 S.Ct. 2561 (1975).

Ward v. County of Orange, 55 F.Supp. 2d 1325, 1331 (M.D. Fla. 1999) (Emphasis added).

The district court also concluded that there was nothing improper about shifting the burden of proof to Mr. Ward as set forth in the ordinance. *Id.* at 1334.

The circuit court affirmed[5] finding the ordinance facially constitutional. In so doing, it interpreted this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) as standing for the broad-based proposition that it is permissible to shift the burden to Ward to prove that the statements, conversations and advertisements at BSS are not sexually stimulating.

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[5] Although the circuit court affirmed the facial challenges, it remanded Mr. Ward's as-applied challenges for reconsideration on the issue of whether they were ripe for review. Subsequently, Mr. Ward advised the district court that he was seeking review with this Court. In an order dated October 20, 2000, the district court abated the case with instructions to the parties to "[j]ointly advise the court within ten (10) days after final action is taken by the U.S. Supreme Court on the petition for certiorari . . . "

> While a majority of the Supreme Court have failed to join Justice O'Connor in recognizing these distinctions, we have explicitly noted the significant differences between censorship schemes and licensing schemes.
>
> * * *
>
> Once again, it is important to stress the differences between censorship schemes and licensing schemes – "the dangers of censorship are less threatening when it comes to licensing schemes." (citation omitted) Accordingly, we conclude a city may place the burden[6] of proving that the "predominant business or attraction of the establishment" is not "intended to provide sexual stimulation or sexual gratification" on the applicant.

217 F.3d at 1355.

On the issue of treating clothed dancing the same as nude dancing, the circuit court simply assumed that in applying this Court's jurisprudence, this was a distinction without a difference. Therefore, it decided without any evidence or authority that fully clothed dancing causes harmful secondary effects as is associated with adult businesses.

> The Supreme Court consistently has held that combating the harmful secondary effects of adult businesses, such as increased crime and

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[6] However, as advanced by Mr. Ward, what the court overlooked is that Mr. Ward is not being required to prove certain ministerial prerequisites. Rather, he must prove that the content of the statements at BSS are not sexually stimulating as defined within the code. That is a far cry from what Justice O'Connor stated in her *FW/PBS* opinion.

> other public health and safety problems is a substantial interest.
>
> * * *
>
> In this case, the zoning ordinance was intended, at least in part, to combat the negative secondary effects of adult establishments. Appellee relied on numerous studies and hearings to show that the presence of adult entertainment establishments is associated with negative secondary effects.

217 F.3d at 1353.

REASONS FOR GRANTING THE WRIT

I. Mr. Ward's petition should be granted because Orange County's definition of "Adult Performance Establishment" unconstitutionally shifts the burden of proof to Mr. Ward to prove that the statements, conversations and advertisements at Bourbon Street are not protected by the First Amendment.

The subject ordinance focuses upon the pure speech rights of patrons and workers at BSS because the county believes that the sexual speech that occurs there should be restricted – the result being that the business must close because it cannot comply with the county's zoning requirements. Whatever it is called, the result is the same: censorship through re-zoning. BSS features and places a premium on allowing its entertainers to spend time talking with its customers – such conversations often include sexual discussions and banter. From a business perspective, this is achieved by selling "chat time tickets." Customers purchase party packages that include "x" number

of chat tickets which allow the customer to enjoy the company and conversation of a performer of his choice for an allotted period of time. Presumably, the county is offended by this practice and, thus, it amended its adult ordinance to specifically cover the statements, conversations and advertisements at Bourbon Street.

> Sexual stimulation means either *to excite or arouse the prurient interest or* to offer, propose, solicit or suggest to provide an act of sexual gratification to a customer, *including but not limited to all conversations, statements, advertisements* and acts which would lead a reasonable person to conclude that an act of sexual gratification was to be provided.

Section 3-6(2)(a), Orange County Code. (App. D) (Emphasis added).

Under the county's legislative scheme, Bourbon Street constitutes an Adult Performance Establishment if the dancers dance with or within three feet of a customer for compensation (no matter how they are clothed or how they dance). If Ward does not want to be zoned out of business, he must prove that the conversations, statements and advertisement at BSS are not "sexually stimulating" as defined above. Again, according to the county's enforcement agents, sexual stimulation may include sexual banter.

This Court has repeatedly held that the entity seeking to restrict free speech rights has the burden to sustain such restrictions. *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976) [exacting scrutiny applied even if restrictions unintended but are the inevitable result of government action]; *United States v. O'Brien*, 391 U.S. 367 (1968) [expressive conduct]; *44 Liquormart, Inc. v. Rhode Island*,

517 U.S. 484 (1996) [commercial speech]; *Sable Communications of California, Inc. v. Federal Comm.*, 492 U.S. 115 (1989) [dial-a-porn legislation banning indecent telephone messages violated First Amendment]; *Reno v. ACLU*, 521 U.S. 844 (1997) [Internet speech]; *Riley v. Nat'l Fed. of the Blind of No. Carolina, Inc.*, 487 U.S. 781, 793-795 (1988) [requiring **speaker to prove** reasonableness unconstitutionally chills speech]; *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) [burden of proof rests with the censor and same must bear the burden of persuasion].

Further, this Court has stood firm in holding that due process prevents the government from shifting the burden of proof to the criminally accused to disprove an element of the offense. *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). A plain reading of the "affirmative defense" set forth within the adult performance establishment definition reveals that the county is requiring Ward to disprove an integral element of the ordinance. "This definition is *not intended to apply*, and it is an affirmative defense to an alleged violation of this chapter regarding operating an adult performance establishment without a license, *if the alleged violator demonstrates . . .* " (App. D, Section 3-6(2)). In fact, the director of the M.B.I. testified that the issue of sexual stimulation was a definitional element.

> Q. Subsection (2) doesn't literally say that is part of the equation. It says that's a defense. You are telling me that it's not a defense, but that's part of the equation?
>
> (Objection omitted).
>
> A. I am not telling you it's not a part of the defense. I am telling you that as a matter of principal we treat it as an element when we

do our investigations. We want to do a very thorough and careful investigation. So for us, it's an element that we look at just like we look at every other element.

Q. Why would it be an element if it doesn't say it's an element?

(Objection omitted).

A. Again, that would be a question you would have to ask the framers of the adult code. I am telling you in practice to make sure we enforce the thing properly, we take the extra step.

* * *

Q. Let me stop you there. If I told you that the county has filed pleadings with the court saying that Subsection (2) has nothing to do with element application, but it's only a defense and nothing more, how do you explain that contradiction?

(Objection omitted).

A. Again, I don't know what the county said and in what context they said what. But what I'm talking about is a process that we are doing as a law enforcement entity to do the most thorough job possible in the enforcement of this particular ordinance. So we go the extra step to do the investigation and treat this as an element as we go through our investigation.

(R8-128-35-37; Lutz deposition at p. 34-36).

The standards changed when the Eleventh Circuit ruled that the burden of proof could be shifted to Ward to

prove that the conversations and advertisements at BSS do not fall within the county's definition of sexual stimulation. Support for this broad-based proposition was derived from this Court's plurality decision in *FW/PBS, Inc. v. Dallas; supra*. This Court should grant certiorari because the circuit court's opinion creates "precedent" which was never envisioned by this Court and, to the contrary, flies in the face of established precedent from this Court. A review of *FW/PBS* shows that this Court would never sanction shifting the burden of proof to Ward to show that the content of the statements at BSS is not "sexually stimulating."

In order to understand how the Eleventh Circuit ran afoul of *FW/PBS*, it is important to understand the procedural history of that case. There, the city of Dallas enacted an ordinance addressing sexually oriented businesses. The most substantial aspects of the Dallas legislation addressed strict locational prohibitions, licensing and inspection, disqualification from licensure based upon certain criminal convictions, a requirement that patrons be visible within the sight of a manager while in an arcade, as well as various lay-out, hiring, furnishing and lighting restrictions. *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1066 (N.D. TX 1986). A complete copy of Chapter 41-a of the Dallas code, "Sexually Oriented Business," was included as an appendix to the district court's decision. *Id.* at 1078. A review of the appendix, specifically those provisions challenged by the plaintiffs, reveals that they have nothing in common with Orange County's ordinance and, further, were in fact more *ministerial* than substantive in nature.

On appeal the plaintiffs argued that the licensing provisions impermissibly shifted the burden of proof in violation of the First Amendment.

> Plaintiffs contend that the licensing scheme must fail for several related reasons. First, they argue that insisting on a license for sexually oriented businesses regulates the content of expression protected by the First Amendment without the procedural protections of *Freedman v. Maryland*, n. 2 (note omitted) and *Fernandes v. Limmer*, n. 3 (note omitted). The ordinance is said to suffer three procedural deficiencies: it places the burden of proof upon the licensee that a license was wrongfully denied; . . .

FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1301 (5th Cir. 1988).

In his dissent, Judge Thornberry made it clear that the Dallas provisions dealt with the mechanical function of seeking an appeal, etc. – unlike the case here where the ordinance specifically targets the conversations at BSS and requires Ward to prove that they are exempt from the definition of sexual stimulation.

> The Dallas ordinance does not provide for a court to review license denials in the manner required by *Freedman*. (Note omitted). The ordinance places the burden of appealing on the licensee, gives no assurance that the burden placed on one denied a license will be of brief duration, and contains no guarantee of swift judicial action.

Id. at 1307[7]. The circuit court affirmed and the plaintiffs then sought relief with this Court.

A plurality of this Court found that the Dallas ordinance did not impermissibly shift the burden of proof because it did not regulate the content of any prohibited speech, but rather placed the burden on the license applicant to establish certain **ministerial** requirements.

> The court also required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman*, the censor engaged in *direct censorship of particular expressive material*. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman* was required to carry the

---

[7] Judge Thornberry went on to quote one of the challenged sections of the ordinance.

> Section 41-11 of the ordinance provides for the following procedures if a license is denied, suspended or revoked:
>
> If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision.

Id. at 1307.

> burden of going to court if the speech was to be suppressed and of justifying its decision once in court. **Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each licensed applicant, a ministerial action that is not presumptively invalid.**

FW/PBS, 493 U.S. at 229 (emphasis added).

In contrast, Orange County must pass judgment on the content of the speech at BSS (conversations and advertisements) in order to determine whether the business falls within the definition of sexual stimulation, and, if so, whether to deny a license application. Clearly this cannot be described as a ministerial function. This Court should vacate the circuit court's opinion because it constitutes a remarkable and unprecedented expansion of this Court's First Amendment jurisprudence.

> [W]e could not agree to a measure that **requires the speaker to prove** "reasonableness" case by case based upon what is at best a loose inference that the fee might be too high.
>
> * * *
>
> Again, the burden is placed on the fund raiser in such cases to rebut the presumption of unreasonableness.
>
> * * *
>
> This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.

Riley v. Nat'l Fed. of the Blind of No. Carolina, Inc., 487 U.S. 781, 793-795 (1988) (emphasis added).

It would be impossible for any agent of Orange County to determine whether the conversations at BSS are sexually stimulating without first reviewing the content and subject matter of those communications. The county cannot possibly determine if BSS falls within the definition of "Adult Performance Establishment" without first determining the content of the protected speech.

Our society teams with sexual innuendo and sexual banter – any of which, depending on the recipient, could be considered sexually stimulating. This Court should not allow the government to restrict the speech of consenting adults and, in so doing, shift the burden of proof to an accused to prove that the speech is protected. That is certainly placing the proverbial First Amendment cart before the horse.

In a similar vein, the Court in *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986), was faced with an ordinance which prohibited all public nudity except in "expressive dance," or nudity connected with drama, science, education or athletic locker rooms. The following section of the ordinance provided for an affirmative defense.

> It is an affirmative defense to a prosecution for violation of [the ordinance] that the nudity or other public exposure, when considered in the context in which presented, provided actual literary, artistic, political or scientific value and was not provided for commercial or sexual exploitation or with an emphasis on an appeal to a prurient interest.

The Court ruled that the ordinance was unconstitutional and that the affirmative defense must fail because:

> It impermissibly shifts the burden of proving the activity did not appeal to the prurient interests, and, therefore, is protected expression. The Supreme Court held in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), that the Due Process Clause requires the prosecution to prove all the elements included in the definition of the offense.

804 F.2d at 1110.

II. Mr. Ward's petition should be granted because Orange County has unlawfully extended this Court's First Amendment/zoning jurisprudence to include Bourbon Street thereby requiring compliance with adult zoning standards even though the Bourbon Street dancers are fully clothed.

This issue concerns where the line is drawn in deciding what is and what is not "adult entertainment." Admittedly, if an ordinance does not impact First Amendment rights, it likely will be analyzed under a general police powers or rational basis test. Therefore, businesses such as massage parlors, lingerie studios, escort services, etc., generally cannot cloak themselves in the protection of the First Amendment because these businesses address a person's conduct rather than protected speech. However, that is not the case here. This ordinance, on its face, places heightened burdens on dance entertainment – **dancing for money**[8]. Nowhere within the challenged ordinance, subsections "c" and "d," does it provide that

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[8] An integral part of Bourbon Street's business is offering its patrons entertainment in the form of floor and stage dance shows. The entertainers dance with customers as well as performing individually, on and off stage.

the performer must be nude or exposing some private part of his or her body. Accordingly, there is no existing authority to establish that this ordinance is constitutional under the First Amendment. None of the traditional, so-called "adult entertainment" cases can be read in such an expansive manner. See *California v. LaRue*, 409 U.S. 109 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

The circuit court's reliance upon *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) is likewise factually inapplicable. **The subject of *Pap's* was nude dancing.** It is difficult to imagine that the Erie ordinance would have passed constitutional scrutiny if it applied to fully clothed women wearing long dresses. This Court appeared to so indicate when it stated:

> It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement **that the dancers be fully clothed**, but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

Pap's, 529 U.S. 277, 146 L.Ed.2d at 286; 120 S.Ct. at 1397 (emphasis added).

Armed with the *Ward* opinion, a government entity could force any business to either relocate or close if the establishment offered dancing as a form of entertainment. Unless, of course, the business could prove that it was not offering "sexually stimulating" entertainment. The *Ward* opinion will have a far greater impact than just Mr. Ward's business. There are at least two district court cases where local governments unsuccessfully attempted to

institute similarly heightened regulations. See *Jersey's All-American Sports Bar v. Washington State Liquor Control Board*, 55 F.Supp. 2d 1131 (W.D. WA. 1999) and *Elam v. Bolling*, 53 F.Supp. 2d 854 (W.D. VA. 1999). The circuit court's opinion could change all that.

In cases involving dancing, this Court has traditionally applied the expression/conduct test embodied in *United States v. O'Brien*, 391 U.S. 367 (1968)[9]. This four-part test requires the government to prove (1) that the regulation is within the power of the government; (2) the ordinance furthers an important or substantial government interest; (3) the government's interest is unrelated to the suppression of free expression; and (4) the restriction on free expression is no greater than essential to furthering the government's interest. This petitioner is unaware of any court decision addressing whether *dancers* wearing skirts and dresses can be restricted under the adult entertainment umbrella – especially when it is beyond dispute that the impact of the restriction will require the dancing to stop.

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[9] As stated within the body of this petition, this is where the court erred. The expressive conduct test, as set forth within *U.S. v. O'Brien*, 391 U.S. 367 (1968), simply has no application because there is no combination of protected and unprotected speech in Ward's case as there was in *O'Brien*. Fully clothed dancing is constitutionally protected and there is no evidence establishing that it harms the community. In other words, dancing itself is protected but if it is *combined* with *nudity*, which is not protected, then the *O'Brien* analysis applies. Because of this distinction, a higher standard, strict scrutiny, should apply in this case.

The last three prongs of the *O'Brien* test are the important ones for purposes of this discussion. The second prong, substantial government interest, appears to be missing entirely. If the county is claiming that BSS causes "adverse secondary effects," where is the supporting evidence? There were no studies presented addressing whether **fully clothed** dance entertainment (dancing for money) has ever produced adverse secondary effects. It is highly unlikely that any such studies have ever been conducted. *The county should not be permitted to rely upon its studies and data addressing nude or* semi-nude dancing because they are no more applicable to BSS than they would be to a Broadway musical. Moreover, there has never been an arrest at BSS for lewdness, prostitution or other like offenses in its ten-year history of doing business. Additionally, two of Mr. Ward's business neighbors, a carpet dealer and the owner of an adjacent auto sales lot, both signed affidavits stating that they had never witnessed or heard of anything that would show that BSS had a negative impact on the community, i.e. traffic congestion, hooliganism, crime, etc. (R1-25; R3-52). If the neighbors have not witnessed such activity and there have been **no arrests** for prostitution, etc., then it seems likely that no adverse secondary effects are being produced, i.e., there is no substantial governmental interest.

This Court should not allow the county to make the quantum leap from nude dancing to fully clothed dancing without some concrete, empirical data showing that this activity harms the community.

As for the third prong, clearly this ordinance is related to the suppression of expression. It was enacted for the specific purpose of suppressing the expression/ dance entertainment at BSS.

The fourth prong of *O'Brien*, i.e., the so-called "least restrictive means" requirement, is glaringly violated by the county's Adult Code. The restriction of fully clothed dancing (dancing with or within three feet of a customer) cannot possibly be the least restrictive means of combating the county's perceived evil, i.e., the "substantial government interest." In fact, it is unquestionably the *most* restrictive means.

For these reasons, even if *O'Brien* is applicable, the county's restrictions fail the test.

III. Mr. Ward's petition should be granted because the Orange County Adult Entertainment Code allows the government to restrict and censor the conversations and communications between patrons and workers at Ward's business. Further, the ordinance is unconstitutionally vague because the definition of "sexual stimulation" relies upon one prong ("prurient interest") of this Court's multi-prong obscenity standard.

As set out above, the county's Adult Code defines the term "sexual stimulation" in part as "to excite or arouse the prurient interest." A person of common intelligence could never know what the county means in using the words *"prurient interest."* In *Brockett v. Spokane Arcades, Inc. et al.*, 472 U.S. 491 (1985), this Court stated that prurient interest refers to abnormal sexual conduct which is illegal under the *obscenity* standard. If this is what the county means, federal courts have ruled that prurient interest in this context is unconstitutionally vague. In 1994, the First Circuit Court of Appeals dealt with similar language and held:

> **The policy itself is almost impossible to understand.** The purported exclusion of all messages or representations "pertaining to sexual conduct" is so vague and broad that it could cover much of the clothing and movie advertising commonly seen on billboards and in magazines. The prior sentence, relating to patently offensive descriptions, is mysteriously connected to unspecified state laws. The **prurient interest** reference appears to be derived from one portion of the Supreme Court's obscenity definition, but one *never intended as a stand-alone criterion of obscenity.* And, significantly, the MBTA does not claim that the condom ads themselves are constitutionally obscene.
>
> We think that the opportunities for discrimination created by this policy have been borne out in practice, and that this case presents an unrebutted claim of discrimination in the application of supposedly neutral standards.

Aids Action Comm. of Mass. v. Mass. Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994) (emphasis added).

In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court stated that the use of one part of the obscenity standard may render a law unconstitutionally vague because the obscenity standard prongs were intended to be analyzed in their totality rather than upon any one prong.

> The government argues that the statute is no more vague than the obscenity standard this court established in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

Id. at 872.

* * *

> The government's assertion is incorrect as a matter of fact. The second prong of the *Miller* test – the purportedly analogous standard – contains a critical requirement that is omitted from the CDA: that the proscribed material be "specifically defined by the applicable state law."
>
> * * *
>
> Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. (note omitted)

Id. at 873.

Furthermore, a person of ordinary intelligence could never determine what advertisements or conversations can be regulated and restricted – because they may **arouse** someone. It is impossible for the government to determine what statements sexually arouse or gratify the average man. For example, we know that the county's agents have stated that sexual innuendos ("Tell me your sexual fantasies") can be used to transform BSS into an adult performance establishment. There is no workable or discernable standard for determining whether a conversation between a customer and a dancer would lead anyone to believe that some illegal sex act is going to occur or that their *sexual desires* may be *aroused/gratified*. This ordinance does not even require an overt act. It is enough that two people talk to one another in a sexually suggestive manner.

The Adult Code is unconstitutional for some of the same reasons articulated by this Court in *Reno v. ACLU*, *supra* at 872.

> The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. (Citation omitted). Second, the CDA is a criminal statute[10]. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. (citation omitted).

The county's Adult Code is also overbroad. First, it regulates and restricts *pure speech* which can only be done if the county has a "paramount interest." *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976); *Sable Comm. of California, Inc. v. Federal Comm.*, 492 U.S. 115, 126-127 (1989) [dial-a-porn legislation banning indecent telephone messages violated First Amendment]. The ordinance, through the definition of sexual stimulation, clearly states that the communications and conversations between customers and dancers can transform a business into an "adult performance establishment." Sexual innuendos and sexual banter are an integral part of this society. In the past, this Court has refused to allow **non-obscene** sexually suggestive communications to be restricted. See *Sable Comm.*, above and *Reno v. ACLU*, 521 U.S. 844 (1997) [indecent speech protected]; see also *Riley v. Nat'l Fed. of the Blind of No.*

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[10] As stated above, numerous arrests were made at BSS because the authorities contend that the business is an "Adult Performance Establishment."

Carolina, Inc., 487 U.S. 781, 793-795 (1988) [requiring speaker to prove "reasonableness" unconstitutionally chills speech].

Under the Orange County Adult Code, if a dancer tells a customer how handsome he is and that she could only imagine how wonderful he would be in bed, Bourbon Street is instantly converted into an adult performance establishment. The ordinance is unconstitutional on this ground alone.

The Adult Code also restricts Mr. Ward's right to advertise. This is illustrated by county agents who have asserted that his *signs* are "sexually stimulating." There is no evidence in this record to establish that Orange County has any legitimate interest in restricting Ward's advertisements and using them to place his business under its restrictive, regulatory *and* criminal law scheme. This Court stated as much in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) [standard to be applied in commercial speech cases].

CONCLUSION

There are two very remarkable and disturbing aspects of the lower court opinions entered in Mr. Ward's case. The first is the assumption that *United States v. O'Brien, supra* and this Court's other zoning cases such as *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), etc. can be expanded to encompass the simple act of dancing for money. A plain reading of the Orange County Adult Code shows that it is not triggered because a dancer performs in the nude, but rather because she

dances for money. The circuit court reached its conclusion without citing any specific authority from this Court to justify such a broad expansion of the law. The lower court simply assumed that if nude dancing had only minimal protection, then all dancing must have only minimal protection. Thus, the lower court opined that the *O'Brien* standard was applicable and was satisfied. For this reason alone, this Court should accept certiorari.

The circuit court's departure from established law is made more significant by the fact that Ward now has the burden of proving that the conversations at BSS are not sexually stimulating. This Court has never required a speaker to prove that the content of certain speech is protected. Orange County is attempting to require Ward to obtain a special license or otherwise close his business. Therefore, Orange County should be required to shoulder the burden of proof in this case. This Court should accept certiorari.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11283

D.C. Docket No. 98-00428-CIV-ORL-19

WILLIAM G. WARD,
d.b.a. Bourbon Street South,

Plaintiff-Appellant,

versus

COUNTY OF ORANGE,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed July 13, 2000)

Before ANDERSON, Chief Judge, and BLACK and HALL* Circuit Judges.

BLACK, Circuit Judge:

Appellant William G. Ward appeals the district court's grant of summary judgment on Appellant's constitutional challenges. On appeal, Appellant claims the

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* Honorable Cynthia Holcomb Hall, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

district court erred in finding in favor of Appellee County of Orange on its facial challenges and erred in dismissing its as-applied challenges. We conclude the district was correct in granting summary judgment with respect to the facial challenges but remand with instructions the as-applied challenges.

I. BACKGROUND

Appellant William G. Ward is the owner of a "swimsuit club" operating under the name Bourbon Street South (BSS). At BSS, customers can purchase "Sweetheart Party Packages," ranging in price from $20 to $200. These packages give customers access to, among other things, nonalcoholic beverages and slow dances with BSS performers. While Appellant claims BSS is no different than other dance studios, Appellee presented extensive evidence showing that BSS differed significantly from traditional dance studios.

For example, one affidavit explained that BSS performers "simulated or actually engaged in masturbation of themselves or displayed their buttocks, genitals, or breasts." The affidavit further noted BSS performers "would rub their bodies against their male customers, press their genitals against those of the customers . . . allow the customers to fondle their buttocks and exposed back . . . and often times would place their hands underneath the customers' shirt or fondle the customer's buttocks." Further evidence showed BSS performers often revealed their body parts to customers.

As a result of such conduct, several performers and a manager at BSS, but not Appellant, were arrested for

violations of Orange County's Adult Entertainment Code (the code).[2] The code reads, in pertinent part, as follows:

Adult performance establishment shall mean as follows:

(1) An establishment where any worker:

a. Engages in a private performance, acts as a private model, or displays or exposes any specified anatomical areas to a customer;

b. Wears and displays to a customer any covering, tape, pastie, or other device which simulates or otherwise gives the appearance of the display or exposure of any specified anatomical areas;

c. Offers, solicits or contracts to dance or perform with a customer in consideration for or accepts any tip, remuneration or compensation from or on behalf of that customer; or

d. Dances or performs with or within three (3) feet of a customer in consideration for or accepts any tip, remuneration, compensation from or on behalf of that customer.

Orange County Adult Entertainment Code, § 3-6. Operations deemed to be adult performance establishments, as defined in the code, must obtain an adult entertainment license and must conform to the zoning requirements contained in sections 3-76 through 3-78 of the code.

Appellant has never applied for an Orange County adult entertainment license. Furthermore, Appellee has

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[2] The performers and manager were arrested for, among other things, operating without an adult entertainment license.

never cited Appellant or BSS for a violation of the code and has never held a code enforcement proceeding against Appellant or BSS. Finally, Appellee has never filed a lawsuit seeking to enjoin actions by Appellant or BSS in violation of the code.

Appellant brought suit against Appellee claiming the code is unconstitutional on its face and as-applied. Among other things, Appellant claimed the code was overbroad, content-based, vague, unrelated to a legitimate state interest, and unconstitutionally shifted the burden of proof. Appellant also argued the code was unconstitutionally applied to BSS. The district court granted summary judgment for Appellee on the facial challenges and determined Appellant's as-applied challenges were not ripe. We affirm the district court with respect to the facial challenges but remand with instructions the as-applied challenges.

II. ANALYSIS

We review de novo the district court's entry of summary judgment. *See AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1324 (11th Cir. 2000). In assessing a motion for summary judgment, "we must examine the evidence in the light most favorable to the non-moving party." *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000). Summary judgment is appropriate if there are no genuine issues of material fact. *See id.*

A. Facial Challenges

1. *City of Renton* Test

We review Appellee's zoning ordinance in this case under the "time, place, or manner" standard set forth by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000). Under this standard, a "zoning ordinance is valid if it is narrowly tailored to serve a substantial government interest, and it allows for reasonable alternative avenues of expression." *Id.*

Appellant's main contention is that the zoning ordinance does not serve a substantial governmental interest. Appellant argues the zoning ordinance regulates pure speech and other expressive forms of conduct and therefore violates the First Amendment. We disagree.

The Supreme Court consistently has held that combating the harmful secondary effects of adult businesses, such as increased "crime and other public health and safety problems," is a substantial interest. *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1397 (2000); *see City of Renton*, 475 U.S. at 50, 106 S. Ct. at 930 (stating that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect") (internal quotation omitted). Significantly, the Court stated that although the "regulation may have some incidental effect on the expressive element of the conduct . . . [t]he State's interest in preventing harmful secondary effects is not related to the suppression of expression." *Pap's*, 120 S. Ct. at 1393. The Court added that it "will not strike down an

otherwise constitutional statute on the basis of an alleged illicit motive." *Id.* at 1392-93. Finally, we have noted "it is not difficult to draft an ordinance that addresses the harmful secondary effects of adult businesses without running afoul of the First Amendment." *Lady J. Lingerie*, 176 F.3d at 1363.

In this case, the zoning ordinance was intended, at least in part, to combat the negative secondary effects of adult establishments. Appellee relied on numerous studies and hearings to show that the presence of adult entertainment establishments is associated with negative secondary effects. Although several of these studies were conducted by different cities, the Supreme Court has made it clear that "the city need not conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Pap's*, 120 S. Ct. at 1395 (internal quotations omitted). Furthermore, Appellee conducted at least one public hearing that specifically examined the secondary effects of Appellant's establishment. Therefore, even assuming, as Appellant alleges, this ordinance incidentally reaches some forms of protected expression, the ordinance is a valid time, place, or manner regulation under *City of Renton* because it is aimed at combating the harmful secondary effects associated with adult entertainment establishments.[3]

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[3] Appellant does not dispute that the ordinance is narrowly tailored and leaves open reasonable alternative avenues of expression.

2. Burden-Shifting

Appellant also contends the ordinance unconstitutionally places on the applicant the burden of proving that the "predominant business or attraction of the establishment" is not "intended to provide sexual stimulation or sexual gratification."[4]

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[4] Section 3-6(2) of the code provides as follows:

> This definition is not intended to apply, and it is an affirmative defense to an alleged violation of this chapter regarding operating an adult performance establishment without a license, if the alleged violator demonstrates either (a) that the establishment is a bona fide private club whose membership as a whole engages social nudism or naturalism as in a nudist resort or camp, or (b) that the predominant business or attraction of the establishment is not the offering to customers of a product, service, or entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and the establishment and its advertising is not distinguished by an emphasis on, or the promotion of, matters or persons depicting, describing, displaying, exposing, stimulating or relating to specified sexual activities or specified anatomical areas.

"Sexual stimulation" is defined as

> either to excite or arouse the prurient interest or to offer, propose, solicit, or suggest to provide an act of sexual gratification to a customer, including but not limited to all conversations, statements, advertisements and acts which would lead a reasonable person to conclude that an act of sexual gratification was to be provided.

"Sexual gratification" is defined as

> the engaging in or committing of an act of sexual intercourse, oral-genital contact, masturbation, or the

The starting point for the burden-shifting analysis is the Supreme Court's decision in *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965). In *Freedman*, the Court discussed the procedural safeguards required for the administration of a motion picture censorship system. *See Freedman*, 380 U.S. at 56-61, 85 S. Ct. at 737-40. The Court noted censorship is "always fraught with danger and viewed with suspicion," and therefore mandated the following safeguards: (1) the burden of proving the film is unprotected by the First Amendment must be placed on the censor; (2) any restraint prior to judicial review may only be imposed for a specified brief period of time during which the status quo must be maintained; and (3) the final judicial decision must be prompt. *Id.* at 57-59, 85 S. Ct. at 738-39.

Subsequently, in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990), the Supreme Court addressed whether a licensing scheme regulating adult entertainment establishments must contain the same procedural safeguards. In a plurality opinion, Justice O'Connor noted "[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS*, 493 U.S. at 228, 110 S. Ct. at 606. As such, the plurality concluded a licensing

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touching of the covered or uncovered sexual organ, pubic region, buttock, breast, chest or inner thigh of a person, any of which is for the purpose of arousing or gratifying the sexual desire of another person.

scheme must provide the second and third safeguards required by *Freedman*. *See id.*

In discussing the first safeguard, however, the plurality emphasized the differences between a censorship scheme and a licensing scheme. Specifically, the plurality noted a censorship scheme is presumptively invalid because it is a direct suppression of expressive material. *See id.* at 229, 110 S. Ct. at 607. In contrast, under a licensing scheme, a "city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.*

Furthermore, the plurality reasoned that license applicants have much more at stake than motion picture distributors: "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *Id.* at 229-30, 110 S. Ct. at 607. Motion picture distributors, however, are more likely to be deterred from challenging a censorship decision and thus a "censor's decision to suppress [speech] was tantamount to complete suppression of the speech." *Id.* at 229, 100 S. Ct. at 607. Because of these distinctions, the *FW/PBS* plurality concluded that the first procedural safeguard from *Freedman* did not apply in the licensing context. *See id.* Thus, a city may require the license applicant to bear the burden of proving that it is engaging in protected activity.

While a majority of the Supreme Court has failed to join Justice O'Connor in recognizing these distinctions,

we have explicitly noted the significant differences between censorship schemes and licensing schemes. *See Boss Capital, Inc. v. Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1423 (2000). In *Boss Capital*, this Court addressed the related issue of whether *Freedman* and *FW/PBS* require a guarantee of a prompt judicial resolution of license denials or merely a guarantee of a prompt judicial review.[5] *See id.* at 1255. While recognizing that *Freedman* "unmistakably requires a prompt final judicial decision" in a censorship scheme, this Court emphasized that licensing decisions are inherently different from censorship decisions. *Id.* at 1256 (internal quotation omitted). We therefore concluded licensing schemes need only provide prompt judicial review of licensing denials. *See id.* at 1256-57.

Once again, it is important to stress the differences between censorship schemes and licensing schemes – "[t]he dangers of censorship are less threatening when it comes to licensing schemes." *Id.* at 1256. And, again, "[w]e believe this is a situation for 'treating unlike things differently according to their differences.' " *Id.* (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999) (en banc)). Accordingly, we conclude a city may place the burden of proving that the "predominant business or attraction of the establishment" is not "intended

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[5] This question, which has divided the Circuits, arises from Justice O'Connor's statement that "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." *FW/PBS*, 493 U.S. at 228, 110 S. Ct. at 606. As noted above, in *Freedman*, the Supreme Court had required a "prompt final judicial decision." *Freedman*, 380 U.S. at 59, 85 S. Ct. at 739.

to provide sexual stimulation or sexual gratification" on the applicant. *See Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 640-41 (4th Cir. 1999) (holding a city may place the burden of "proving no adverse secondary effects on the applicant"); *Florida Video Xpress, Inc. v. Orange County*, 983 F. Supp. 1091, 1098 (M.D. Fla. 1997) (concluding an adult entertainment code may shift the burden to a business to prove that it is not an adult entertainment establishment).

3. Overbreadth

An ordinance is unconstitutionally overbroad "when lawmakers define the scope of a statute to reach both unprotected expression as well as, at least potentially, protected speech." *American Booksellers v. Webb*, 919 F.2d 1493, 1502 (11th Cir. 1990). We will consider an ordinance to be facially invalid under the First Amendment only if it is "substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases." *Agan v. Vaughn*, 119 F.3d 1538, 1542 (11th Cir. 1997).

Appellant has failed to show the application of the ordinance would be unconstitutional in a substantial proportion of cases. Therefore, the district court was correct in granting summary judgment for Appellee on this claim.[6]

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[6] Appellant also argues the terms "sexual gratification" and "sexual stimulation," as used in the ordinance, are unconstitutionally vague. We, however, have already held that a similar term is not unconstitutionally vague. *See Stansberry v.*

B. As-Applied Challenges

Appellant contends the district court erred in concluding its as-applied challenges were not ripe. In order for an as-applied challenge against a county to be ripe, a county official "with sufficient authority must have rendered a decision regarding" the party's proposal. *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997). Furthermore, "[w]ithout the presentation of a binding conclusive administrative decision, no tangible controversy exists and, thus, we have no authority to act." *Id.* We simply have "neither the power nor the inclination" to resolve a potential dispute founded only on a party's belief that a county would interpret an ordinance in such a way as to violate the party's First Amendment rights. *Id.* at 591. However, a party need not seek a binding conclusive administrative decision where such an effort would be futile. *See Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir. 1990).

Thus, in the typical case, Appellant's as-applied challenge would be ripe only if Appellant had applied for a license or if Appellant demonstrated an application would have been futile. At first glance, it therefore appears Appellant has not presented this Court with a ripe controversy, as it has failed to apply for a license and

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Holmes, 613 F.2d 1285, 1289 (5th Cir. 1980). This case is binding on this Court pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), in which this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981. The district court therefore did not err in granting summary judgment on this claim.

has failed show it would have been futile to do so. This, however, is not the typical case. In this case, Appellant is not seeking a license. Rather, Appellant contends it is not an adult entertainment establishment as defined in the code. Appellant therefore asserts it is not required to apply for a license.

In their briefs, the parties did not address whether, before bringing the as-applied challenges, Appellant applied to the zoning board to determine whether it needed a license to operate BSS. The panel, and we presume the district court, assumed this procedure was available to Appellant. However, when asked at oral argument, counsel for Appellee, perhaps unprepared to answer the question, did not affirmatively state that such a mechanism existed and seemed to suggest the only way for Appellant to ripen this case was to apply for a license. As it is obviously illogical to force Appellant to apply for a license it repeatedly argues it does not need, the ripeness of the as-applied claim depends on whether Appellant could have obtained from the zoning board a determination whether BSS needed a license. If a procedure exists, the as-applied challenges are not ripe, as Appellant has failed to show that a county official with sufficient authority rendered a decision regarding BSS. If, however, a procedure does not exist, we conclude Appellant's as-applied challenges are ripe and would need to be considered by the district court. We therefore remand the as-applied challenges to the district court to determine whether Appellant could have sought a ruling from the zoning board as to whether Appellant was required to obtain a license for BSS.

III. CONCLUSION

We affirm the district court's grant of summary judgment on Appellant's facial constitutional challenges but remand with instructions the as-applied challenges.

AFFIRMED IN PART and REMANDED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

WILLIAM G. WARD,
d/b/a BOURBON STREET SOUTH,

Plaintiff,

v.

COUNTY OF ORANGE,

Defendant.
_____/

CASE NO.
98-428-CIV-ORL-19B

ORDER

This cause came before the Court on the following matters:

(1) Defendant's Motion for Partial Summary Judgment as to Plaintiff's "As Applied" Claims Based on Ripeness or Lack of Jurisdiction (Doc. No. 16, filed January 19, 1999); Defendant's Memorandum in Support of Motion for Partial Summary Judgment (Doc. No. 97, filed January 19, 1999); and Plaintiff's Response to Four Motions for Summary Judgment (Doc. No. 147, filed February 10, 1999);

(2) Defendant's Motion for Partial Summary Judgment regarding Definition of "Adult Performance Establishment" (Doc. No. 98, filed January 19, 1999); Defendant's Memorandum of Law in Support of Motion for Partial Summary Judgment (Doc. No. 99, filed January 19, 1999); and Plaintiff's Response to Four Motions for

Summary Judgment (Doc. No. 147, filed February 10, 1999);

(3) Defendant's Motion for Partial Summary Judgment as to the Shifting of the Burden of Proof (Doc. No. 100, filed January 19, 1999); Defendant's Memorandum in Support of Motion for Partial Summary Judgment as to the Shifting of the Burden of Proof (Doc. No. 101, filed January 19, 1999); and Plaintiff's Response to Four Motions for Summary Judgment (Doc. No. 147, filed February 10, 1999);

(4) Defendant's Motion for Partial Summary Judgment as to the Constitutionality of the Orange County Adult Entertainment Code (Doc. No. 102, filed January 19, 1999); Defendant's Memorandum of Law in Support of Motion for Partial Summary Judgment as to the Constitutionality of the Orange County Adult Entertainment Code (Doc. No. 103, filed January 19, 1999); and Plaintiff's Response to Four Motions for Summary Judgment (Doc. No. 147, filed February 10, 1999);

(5) Plaintiff's Motion for Summary Judgment (Doc. No. 133, filed January 26, 1999); Plaintiff's Memorandum in Support of Motion for Summary Judgment (Doc. No. 134, filed January 26, 1999); and Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (Doc. No. 152, filed February 19, 1999);

(6) Plaintiff's Motion for Review of Magistrate Judge's Discovery Rulings (Doc. No. 160, filed March 1, 1999) and Defendant's Response to Motion for Review (Doc. No. 162, filed March 11, 1999);

(7) Defendant's Motion with Memorandum in Support to Strike Late-Filed Affidavit of Kelly Wellnitz (Doc. No. 161, filed March 4, 1999) and Plaintiff's Response to Defendant's Motion to Strike (Doc. No. 163, filed March 16, 1999);

(8) Plaintiff's Motion with Memorandum in Support to Exclude Consideration of Defendant's filings addressing B.G.'s Bar and Crazy Girls for purposes of Summary of Judgment (Doc. No. 164, filed March 18, 1999) and Defendant's Response to Plaintiff's Motion to Exclude (Doc. No. 165, filed March 30, 1999);

(9) Notice of Conflict and Unopposed Motion by Defendant for a Trial Date after the First Week of the May Trial Term (Doc. No. 166, filed March 31, 1999);

(10) Defendant's Motion Requesting Court to Decline Supplemental Jurisdiction (Doc. No. 174, filed April 12, 1999); Defendant's Memorandum in Support of Motion Requesting Court to Decline Supplemental Jurisdiction (Doc. No. 175, filed April 12, 1999);

(11) Request by Defendant with Memorandum in Support for Judicial Notice (Doc. No. 179, filed April 12, 1999);

(12) Plaintiff's Motion to Continue Trial Due to Health Problems (Doc. No. 183, filed April 19, 1999) and Defendant's Response to Motion to Continue Trial (Doc. No. 184, filed April 21, 1999).

I. BACKGROUND[1]

Plaintiff, William G. Ward, is the owner of a "swimsuit club"[2] operating under the name Bourbon Street South. According to Mr. Ward, the employees of his club do not perform in the nude.[3] (Doc. No. 6, Ward Aff., at 1). In fact, Mr. Ward claims that he "would not care if the hostesses wore long dresses down to their knees or ankles." *See id.* He also maintains that no alcohol is served at Bourbon Street. *See id.* at 2.

The simple goal of Bourbon Street, according to Mr. Ward, is the entertainment of customers. *See id.* In this regard, customers must purchase "Sweetheart Party Packages," ranging in price from twenty dollars to two hundred dollars. *See* (Doc. No. 1, Compl., Exh. 1). These packages entitle customers to, among other things, non-alcoholic beverages and "slow dances" with Bourbon Street performers, who are called Sweethearts. Mr. Ward theorizes that customers are willing to pay up to two hundred dollars for their clothed Sweethearts to join

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[1] Several of the facts and arguments presented in the background section were taken from the submissions of the parties on Plaintiff's Motion for Preliminary Injunction. Mr. Ward incorporated such evidence into his Motion for Summary Judgment. *See* (Doc. No. 133).

[2] A "swimsuit club" features female dancers who, in theory, do not appear without clothes. "Swimsuit clubs" are also referred to as "juice bars" because no alcohol is served at such clubs.

[3] The Court notes that Mr. Ward did not visit Bourbon Street at any time in 1998 and visited such establishment "infrequently, if at all" from 1991 through 1997. *See* (Doc. No. 167, Pretrial Statement, Admissions, at 12).

them in consuming nonalcoholic beverages and slow dances because "[p]eople like to talk to people." *See* (Doc. No. 6, at 2). He also noted that Sweethearts "make the customers feel good about themselves." *See id.*

Mr. Ward argues that his club is no different from any other mainstream dance studio with respect to the sexual gratification of the customers. In particular, he complains that Bourbon Street provides no more sexual gratification than Arthur Murray's Dance Studio:

> If an older woman wishes to learn to Waltz or "la bamba," she can go to Arthur Murray's and pay to have a man teach her to dance. Of course the woman finds this enjoyable and entertaining, otherwise she would not pay the fee. Does this mean that she is sexually gratified? . . . If talking to a woman and dancing with a woman (slow dancing or otherwise) is sexually stimulating then virtually everything in life is sexually stimulating.

See id. at 4. Ultimately, he wonders how a performance can be classified as sexually stimulating "[i]f there is no sex involved." *See id.*

Defendant, Orange County, presented affidavits painting a much different picture of the activities occurring at Bourbon Street from the one rendered by Mr. Ward. For example, an agent of the Metropolitan Bureau of Investigation ("MBI"), a task force including, *inter alia*, Orange County law enforcement officers, averred that the Sweethearts at Bourbon Street "would rub their bodies against their male customers, press their genitals against those of the customers, expose their breasts, expose the

lips of their vaginas, expose the cleavage of their buttocks, allow the customers to fondle their buttocks and exposed back, and often times would place their hands underneath the customers' shirt or fondle the customer's buttocks" while "slow dancing" with customers. *See* (Doc. No. 43, Winsett Aff., ¶ 4(e)). Additionally, Sweethearts would dance on an elevated stage when they were not slow dancing with customers. *See id.*, ¶ 4(g). During these solo dances, the Sweethearts "simulated or actually engaged in masturbation of themselves or displayed their buttocks, genitals, or breasts." *See id.*

Orange County also submitted the affidavit of Frank D'Amico, a former employee of Bourbon Street. *See* (Doc. No. 44, Exh. A). Mr. D'Amico was employed by Bourbon Street for fourteen months. *See id.* During his employment, Mr. D'Amico "observed female dancers have their hands inside men's pants or have a towel over a male's penis and proceeded to masturbate [*sic*] him. Also[,] male customers were permitted to fondle females[']' breasts and their pubic area."[4] *Id.*

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[4] In a supplemental affidavit filed by Plaintiff, Mr. D'Amico indicates that the statement he provided to the MBI left out that "this activity seldom occurred" and that dancers would be fired if they were caught masturbating a customer. (Doc. No. 50, at 1). However, the Court notes that Mr. D'Amico signed his sworn, handwritten statement to the MBI on both pages of the statement. (Doc. No. 44, Exh. A). Also, it does not appear that Mr. D'Amico's statement is missing any pages that might have included this supplemental information. *See id.* Finally, Mr. D'Amico swore that he agreed to "VOLUNTARILY MAKE THE FOLLOWING STATEMENT WITHOUT THREAT, COERCION, OFFER OF BENEFIT OR FAVOR BY ANY PERSONS WHOMSOEVER." *See id.* (capitals and emphasis in original).

Another former employee of Bourbon Street, Ramona Alma Fields, asseverated that she masturbated male customers while they digitally fondled her vagina.[5] (Doc. No. 57, Exh. 3-A). Ms. Fields claims that she was instructed to do so by the management of Bourbon Street. *See id.* Ms. Fields also stated that management observed her masturbating customers almost every night that she worked. *See id.* Furthermore, Ms. Fields claims that she saw a dancer engage in sexual intercourse with a customer inside Bourbon Street and that she saw other dancers perform fellatio on customers.[6] *See id.*

Frequently, dancers displayed the cleavage of their buttocks during slow dances and solo dances. (Doc. No. 45, Scholer Aff., ¶¶ 10, 13-14). A dancer also displayed the "right outer lips of her vagina" to an MBI agent. *See id.*¶ 13; *see also* (Doc. No. 57, Exh. 3-A, Fields Aff.) (stating that dancers revealed their vagina by pulling their panties back). On a different occasion, a dancer displayed her "untaped nipples" to an MBI agent. *See id.*; (Doc. No. 45, Scholer Aff., ¶ 18); *see also* (Doc. No. 57, Exh. 3-A, Fields Aff.) (stating that dancers revealed their breasts to customers). Finally, Mr. Ward admitted that the dancers at

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[5] Mr. Ward challenges the veracity of Ms. Fields' statement. (Doc. No. 60, ¶ C). He claims that Ms. Fields is presently incarcerated on two felonies and that Ms. Fields worked at Bourbon Street for only nine days. *See id.*

[6] Ms. Fields explained that a Bourbon Street employee walked around the club and "would let [Ms. Fields] know if it was okey [sic] to carry on with the sexual activity." *See* (Doc. No. 57, Exh. 3-A). This may explain why MBI officers were unable to verify personally some of the more egregious behavior alleged by Mr. D'Amico and Ms. Fields.

Bourbon Street were instructed on the "seventeen basic dance steps, including 'ring around the posies,' 'ride the pole,' 'thee babydoll kick,' 'cat crawl,' 'pole tricks,' 'the L'pose', and wave $100 move.' " *See* (Doc. No. 167, at 13).

The managers and employees who worked at Bourbon Street were employed by Centerfold Management Team, Inc., which is not a party to the lawsuit. *See* (Doc. No. 167, Pretrial Statement, Admissions, at 12). Moreover, such employees were not directly employed by Mr. Ward and, instead, were paid by Staff Leasing Corporation with which he contracted for services. *See id.* In addition, the dancers at Bourbon Street were independent contractors who were not paid a salary or wage by Mr. Ward. Finally, Mr. Ward did not file Form 1099s with the Internal Revenue Service for such dancers. *See id.*

Mr. Ward has not applied for an Orange County adult entertainment license from Orange County.[7] *See id.* at 11. In addition, code inspectors from Orange County have never cited Mr. Ward or Bourbon Street for a violation of the Adult Entertainment Code. *See id.* at 15. Moreover, Orange County's Code Enforcement Board has never held a code enforcement proceeding or taken any action against Mr. Ward or Bourbon Street. *See id.* Finally, Orange County has never filed a lawsuit against Mr. Ward or Bourbon Street seeking to enjoin actions in violation of the Adult Entertainment Code at Bourbon Street. *See id.* However, several dancers and a manager at Bourbon Street, none of whom was an employee of Mr. Ward

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[7] The Court notes that Mr. Ward applied for and received such licenses for several other establishments he owns. *See* (Doc. No. 167, at 11).

or Bourbon Street or a party in this case, have been arrested for violations of Orange County's Adult Entertainment Code. *See id.* at 12 and 15.

Mr. Ward seeks summary judgment on his facial and as-applied constitutional challenges to Orange County's Adult Entertainment Code ("Code"). *See* (Doc. No. 133). First, he argues that the Code cannot be constitutionally applied to Bourbon Street because no nude or obscene dancing is involved and no alcohol is served. Second, he argues that the Code is overbroad, content-based, arbitrary and capricious, vague, impinges upon commercial speech, and unconstitutionally shifts the burden of proof. Finally, he contends that the Code's definition of adult performance establishment in section 3-6 is not rationally related to a legitimate state interest. Orange County has moved for summary judgment on Mr. Ward's as-applied claims, overbreadth and vagueness challenges, shifting of burden challenge, and the constitutionality of the Code. *See* (Doc. Nos. 96, 98, 100, 102).

II. ADULT ENTERTAINMENT CODE

The definition of an adult entertainment establishment includes adult performance establishments. Adult Entertainment Code, § 3-6(b).[8] Adult performance establishment is defined as follows:

> *Adult performance establishment* shall mean as follows:

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[8] Chapter Three of the Orange County Code is the Adult Entertainment Code, which is submitted at Docket Number 111, Exhibit 2.

(1) An establishment where a worker:

a. Engages in a private performance, acts as a private model, or displays or exposes any specified anatomical areas to a customer;

. . . .

c. Offers, solicits or contracts to dance or perform with a customer in consideration for or accepts any tip, remuneration or compensation from or on behalf of that customer; or

d. Dances or performs with or within three (3) feet of a customer in consideration for or accepts any tip, remuneration or compensation from or on behalf of the customer.

(2) This definition is not intended to apply, and it is an affirmative defense to an alleged violation of this chapter regarding operating an adult performance establishment without a license, if the alleged violator demonstrates either . . . (b) that the predominant business or attraction of the establishment is not the offering to customers of a product, service, or entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and the establishment and its advertising is not distinguished by an emphasis on, or the promotion of, matters or persons depicting, describing, displaying, exposing, simulating or relating to specified sexual activities or specified anatomical areas.

"Sexual gratifidation" and "sexual stimulation" are also defined in section 3-6. Sexual gratification is defined as follows:

> [T]he engaging in or committing of an act of sexual intercourse, oral-genital contact, masturbation, or the touching of the covered or uncovered sexual organ, pubic region, buttocks, breast, chest or inner thigh of a person, any of which is for the purpose of arousing or gratifying the sexual desire of another person.

Moreover, sexual stimulation is defined as follows:

> [E]ither to excite or arouse the prurient interest or to offer, propose, solicit, or suggest to provide an act of sexual gratification to a customer, including but not limited to all conversations, statements, advertisements and acts which would lead a reasonable person to conclude that an act of sexual gratification was to be provided.

The Adult Entertainment Code also includes extensive findings of fact explaining the purpose of such Code. *See* Code, § 3-5.

III. STANDARD

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict

for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied the burden, the Court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The Court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

The Court notes that only Mr. Ward's facial challenges to the Adult Entertainment Code will be analyzed. *See infra* Part IV. Such challenges do not require the resolution of any factual disputes. *See id.*

IV. DISCUSSION

This case is essentially a zoning dispute. If Bourbon Street is found to be an adult performance establishment within the meaning of the Adult Entertainment Code, section 3-6, then it is unlikely that Bourbon Street would conform to the zoning requirements contained in sections 3-76 through 3-78. *See* (Doc. No. 111, Exh. 2); *see also* (Doc. No. 5, Pl.'s Mot. for Prelim. Inj., at 2) (acknowledging that Bourbon Street is not zoned for "adult use"). Thus, Defendant is not attempting to ban "swimsuit clubs" or

adult performance establishments; rather, it seeks merely to regulate them.

Counsel for Mr. Ward suggests that this case is different from all other reported adult establishment cases holding that reasonable zoning restrictions are constitutional because the dancers at Bourbon Street perform, according to Mr. Ward, fully clothed.[9] Because of this distinction, Mr. Ward believes that he should not be subject to zoning restrictions applicable to establishments in which dancers perform without clothes. In this way, this case represents another attempt by the judiciary to weigh "the individual's right to engage in constitutionally protected activities against the community's right to implement zoning changes to address local concerns." *See 801 Conklin St. Ltd. v. Town of Babylon*, No. 95-CV-2062, 1999 WL 137745, at *6, – F. Supp.2d – (E.D.N.Y. March 9, 1999).

A. Facial Challenges

1. Freedom of Speech

Initially, the Court will determine whether the definition of "adult performance establishment" contained in section 3-6 of the Adult Entertainment Code is facially invalid under the First Amendment's guarantee of freedom of speech. Since this is a facial challenge, the Court's

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[9] Counsel for Mr. Ward stated that "[t]here is not one case that counsel is aware of that holds that the secondary effects doctrine applies to fully clothed dancing." *See* (Doc. No. 147, at 8).

analysis will limited [sic] to whether Orange County is justified in treating establishments meeting the Code's definition of adult performance establishment differently from those not meeting such definition.

The first inquiry in analyzing a freedom of speech question is whether the activity sought to be regulated is protected by the First Amendment. *See Redner v. Dean*, 29 F.3d 1495, 1499 (11th Cir. 1994). The Eleventh Circuit has held that nude dancing is entitled to "some degree" of First Amendment protection. *See id.* (citing *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991) (plurality opinion)). Thus, for the purposes of the present case, the Court will assume that fully-clothed dance performances are entitled to "some degree" of First Amendment protection also. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) (striking down ordinance that attempted to ban all live entertainment within its jurisdiction). However, such performances involve only the "barest minimum of protected expression." *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

If protected activity is present, the second inquiry is whether the restriction is content-based or content-neutral. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986); *Town of Babylon*, 1999 WL 137745, at *8. If a regulation is content-based, then it "presumptively violate[s] the First Amendment." *See Renton*, 475 U.S. at 46-47. However, a regulation that is content-neutral may include reasonable time, place, or manner restrictions if they serve a substantial governmental interest and "do not unreasonably limit alternative avenues of communication." *See id.* at 47.

The *Renton* Court noted that adult use ordinances do not "fit neatly into either the 'content-based' or the 'content-neutral' category" because such ordinances treat performances of an "adult" nature different from those without such emphasis. *See id.* at 47. However, the Court determined that the challenged ordinance was concerned with the "secondary effects of adult theatres, and not with the content of adult films themselves." *See id.* Consequently, the Court held that such ordinance should be "reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *See id.* at 48-49.

For the reasons that follow, the Court finds that Orange County's Adult Entertainment Code addresses the secondary effects of adult performance establishments rather than the content of the expressive conduct occurring at such establishments. In this regard, the Findings of Facts contained in section 3-5 of the Adult Entertainment Code recite twenty-six different types of secondary effects attendant to the adult uses regulated in such Code. (Doc. No. 111, Exh. 2). These findings of facts were based, in part, on the following studies:

> United States Attorney General's Commission on Pornography (1986), Jacksonville Ordinance Code, Chapter 410, Ord. 77-257-256, § 1, the Los Angeles Municipal Code, § 12.70, Ord. 156509 (1982), the Detroit Zoning Ordinance, 66,0000, Ord. 742-G, § 1, 10-24-72, and "A Summary of a National Survey of Real Estate Appraisers Regarding the Effect of Adult Bookstores on Property Values," conducted by the Division of Planning, Department of Metropolitan Development, Indianapolis, January 1984.

See id., § 3-5. Moreover, Orange County held over thirty public hearings "pertaining to the adult entertainment industry and sexually oriented business" at which secondary effects were considered. *See* (Doc. No. 167, Pretrial Statement, Admissions, at 8-10). Orange County also held several public hearings on the Secondary effects, including prostitution, lewd behavior, and urban decay, specific to "swimsuit clubs." *See id.* at 9-10. Finally, during a public hearing on June 23, 1998, Orange County considered evidence that Bourbon Street in particular was a source of harmful secondary effects. *See id.* at 11.

The United States Supreme Court noted that a county may rely on studies produced by other cities. *See Renton*, 475 U.S. at 50-51. Amplifying this conclusion, the Court stated as follows:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant* to the problem that the city addresses.

See id. at 51-52 (emphasis added); *see also Centerfold Club, Inc. v. City of St. Petersburg*, 969 F. Supp. 1288 (M.D. Fla. 1997) (applying *Renton* analysis to St. Petersburg, Florida ordinance). Thus, based on the extensive evidence relied upon by Orange County, the Court finds that the Adult Entertainment Code is content-neutral because it is not designed to suppress speech associated with adult uses but to address the secondary effects attendant to such uses.

The final inquiry to determine whether an ordinance violates the First Amendment was provided by the Eleventh Circuit as follows:

> (1) The interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative.

See Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 996-97 (11th Cir. 1998). With regard to the first element, the Eleventh Circuit noted that a county's "interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial." *See International Eateries of Am., Inc. v. Broward County, Fla.*, 941 F.2d 1157, 1162 (11th Cir. 1991). The Eleventh Circuit also noted that zoning restrictions similar to those imposed by Orange County's Adult Entertainment Code furthered a county's interest in combating harmful secondary effects. *See id.* In addition, as demonstrated above, Orange County's Adult Entertainment Code is unrelated to the suppression of free speech. Thus, the third element is satisfied. Finally, the Eleventh Circuit has upheld distance requirement similar to those imposed by Orange County. *See id.* at 1163. Based on the foregoing, the Court concludes that the Orange County Adult Entertainment Code satisfies the *Renton* Court's First Amendment analysis.

2. Overbreadth

Orange County has also moved for summary judgment on Mr. Ward's overbreadth challenge. *See* (Doc. Nos.

98-99). In this context, overbreadth "results when lawmakers define the scope of a statute to reach both unprotected expression as well as, at least potentially, protected speech." *See American Booksellers v. Webb*, 919 F.2d 1493, 1503 (11th Cir. 1990). Moreover, a regulation will be held facially invalid under the First Amendment only if it is "substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases." *See Agan v. Vaughn*, 119 F.3d 1538, 1542 (11th Cir. 1997).

The gravamen of Mr. Ward's overbreadth argument is that the definition of adult performance establishment includes dancing by fully-clothed individuals within its ambit. The Court has already found that Orange County may implement zoning regulations that affect fully-clothed dancers who perform at establishments otherwise meeting the definition of adult performance establishment. Alternatively, even if such definition were overbroad in some respects, the Court finds that this would not make the definition overbroad "in a substantial proportion of cases." *See id.* Consequently, Mr. Ward has not demonstrated that he Adult Entertainment Code is overbroad in any respect and certainly not in a substantial proportion of cases.

3. Vagueness

The vagueness doctrine focuses of "whether the law in question affords a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *See id.* at 1505 (citation

omitted). The United States Supreme Court explained the rationale behind precluding overly vague laws as follows:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminary enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

See Village of Hoffman Estates v. Flipside, Hoffman estates, Inc., 455 U.S. 489, 497 (1982).

The terms "sexual gratification" and "sexual stimulation," as used in Orange County's Adult Entertainment Code, are not unconstitutionally vague. *See Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980)[10] (noting that such terms are not vague); *see also SDJ, Inc. v. City of Houston*, 636 F. Supp. 1359, 1367 (S.D. Tex. 1986) (same), *aff'd*, 837 F.2d 1268 (5th Cir. 1988); *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1197 (9th Cir. 1988) (concluding that

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[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

such terms are not facially invalid). Thus, the Court cannot conclude that the definition of adult performance establishment, which is the subject of Mr. Ward's vagueness challenge, is unconstitutional.

4. Arbitrary and Capricious

Mr. Ward claims that the definition of adult performance establishment "is so broad (as applied) that it is subject to arbitrary enforcement." *See* (Doc. No. 134, at 4). Mr. Ward's argument fails for several reasons. First, the Court has rejected Mr. Ward's vagueness challenge. Second, Mr. Ward is challenging the arbitrary enforcement of the ordinance. For the reasons expressed in Part IV.B, *infra*. Mr. Ward's as-applied challenges are not ripe for consideration. Thus, the Court will not examine Mr. Ward's arbitrary and capricious challenge to the extent that it asserts an as-applied challenge to the Adult Entertainment Code. Alternatively, to the extent that Mr. Ward attempts to state a claim for selective enforcement, he has not shown invidiousness or bad faith. *See Fillingim v. Boone*, 835 F.2d 1389, 1399 (11th Cir. 1988).

5. Shifting of Burden

Section 3-6, Adult Entertainment Code, establishes certain affirmative defenses to a charge that an establishment is an adult performance establishment. *See* (Doc. No. 111, Exh. 2). Mr. Ward argues that shifting the burden of proof to an establishment violates the constitution. However, in a similar attack on Orange County's Adult Entertainment Code, the court noted that a licensing authority need not bear the burden of proof. *See Florida*

Video XPress, Inc. v. Orange County, Fla., 983 F. Supp. 1091, 1098 (M.D. Fla. 1997). In this regard, the United States Supreme Court has stated that "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990). Thus, the burden of proof may be shifted to the applicant in the licensing context. *See id.* at 230;[11] *see also Steakhouse, Inc. v. City of Raleigh, N.C.*, 166 F.3d 634, 640-41 (4th Cir. 1999) (holding that city could place burden of proof on topless bar to prove the absence of secondary effects); *see also Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994) (noting in *dicta* that license applicant may be forced to carry the burden of proof).

B. As-Applied Challenge

Orange County has moved for summary judgment on Mr. Ward's as-applied challenges to the Adult Entertainment Code. *See* (Doc. Nos. 96-97). In particular, Orange County argues that Mr. Ward may not challenge the application of the Code because he has not applied for an adult entertainment license and no enforcement proceedings have been brought against him. *See* (Doc. No. 97, at 2-3). According to Orange County, even if Mr. Ward believes that he could not satisfy the zoning requirements

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[11] The *FW/PBS, Inc.* Court stated that prompt judicial review is required in a licensing statute. However, Mr. Ward has not argued that Orange County's Adult Entertainment Code is deficient in providing prompt judicial review. Thus, the Court will not address such issue.

contained in the Code, he could request a variance. *See id.* (citing Orange County Code, §§ 3-79, 30-45, 30-46).

Although Orange County cited no case law supporting the dismissal of an as-applied constitutional challenge for lack of ripeness, the Court has located the Eleventh Circuit's decision in *Digital Properties, Inc. v. City of Plantation*, which supports such argument. *See* 121 F.3d 586 (11th Cir. 1997). In *Digital Properties*, an adult book and video store was required to exhaust administrative options, including the request of a zoning variance, before "rush[ing] to the courthouse and present[ing] an insufficiently concrete claim." *See id.* at 590-91. Consequently, the as-applied claims were not ripe, and such claims were properly dismissed for lack of subject-matter jurisdiction. *See id.* at 591.

Here, Mr. Ward should not have "rushed to the courthouse." He should have requested an adult entertainment license, including a variance request if his initial request was unsuccessful, before filing suit in this Court. Moreover, the arrests of several dancers and a manager at Bourbon Street for operating or working at an adult entertainment establishment without a license are not relevant for two reasons. First, these individuals are not parties to this case. Second, they were not employees of Mr. Ward or Bourbon Street. Finally, if Mr. Ward had applied for a proper license for Bourbon Street, including the request of a variance, if necessary, the workers may not have been arrested in the first instance. In this way, Mr. Ward's argument that the arrests of the workers satisfy the ripeness inquiry, in reality, underscores his obligation to apply for a proper license before filing suit

in this Court. consequently, Mr. Ward's as-applied claims will be dismissed for lack of subject-matter jurisdiction.

V. CONCLUSION

Based on the foregoing, the Court rules as follows:

(1) Defendant's Motion for Partial Summary Judgment as to Plaintiff's "As Applied" Claims Based on Ripeness or Lack of Jurisdiction (Doc. No. 96, filed January 19, 1999) is **GRANTED**. Plaintiff's as-applied claims are **DISMISSED** without **PREJUDICE**.

(2) Defendant's Motion for Partial Summary Judgment regarding Definition of "Adult Performance Establishment" (Doc. No. 98, filed January 19, 1999) is **GRANTED**.

(3) Defendant's Motion for Partial Summary Judgment as to the Shifting of the Burden of Proof (Doc. No. 100, filed January 19, 1999) is **GRANTED**.

(4) Defendant's Motion for Partial Summary Judgment as to the Constitutionality of the Orange County Adult Entertainment Code (Doc. No. 102, filed January 19, 1999) is **GRANTED**.

(5) Plaintiff's Motion for Summary Judgment Doc. No. 133, filed January 26, 1999) is **DENIED**.

(6) Plaintiff's Motion for Review of Magistrates Judge's Discovery Rulings (Doc. No. 160, filed March 1, 1999) is **DENIED as MOOT**.

(7) Defendant's Motion with Memorandum in Support to Strike Late-Filed Affidavit of Kelly Wellnitz (Doc. No. 161, filed March 4, 1999) is **DENIED as MOOT**.

(8) Plaintiff's Motion with Memorandum in Support to Exclude Consideration of Defendant's filings addressing B.G.'s Bar and Crazy Girls for purposes of Summary Judgment (Doc. No. 164, filed March 18, 1999) is **GRANTED**. The Court did not consider the challenged evidence.

(9) Notice of Conflict and Unopposed Motion by Defendant for a Trial Date after the First Week of the May Trial Term (Doc. No. 166, filed March 31, 1999) is **DENIED as MOOT**.

(10) Defendant's Motion Requesting Court to Decline Supplemental Jurisdiction (Doc. No. 174, filed April 12, 1999) is **DENIED** to the extent that such motion seeks relief greater than that provided elsewhere in this Order.

(11) Request by Defendant with Memorandum in Support for Judicial Notice (Doc. No. 179, filed April 12, 1999) is **GRANTED**.

(12) Plaintiff's Motion to Continue Trial Due to Health Problems (Doc. No. 183, filed April 19, 1999) is **DENIED as MOOT**.

(13) The Clerk is directed to enter Judgment in favor of Defendant and against Plaintiff on all of Plaintiff's claims, except for the as-applied challenges to Orange County's Adult Entertainment Code.

(14) Plaintiff's as-applied challenges to Orange County's Adult Entertainment Code are **DISMISSED without PREJUDICE** due to lack of subject-matter jurisdiction.

(15) The clerk is directed to **CLOSE** this case.

DONE AND ORDERED at Orlando, Florida, this 29th day of April, 1999.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT
JUDGE

Copies to:
All Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-11283-FF

WILLIAM G. WARD,
d.b.a. Bourbon Street south [sic]

Plaintiff-Appellant,

versus

COUNTY OF ORANGE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___F.2d___).

(Filed Sept. 18, 2000)

Before: ANDERSON, Chief Judge, BLACK and HALL* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

*Honorable Cynthia Holcomb Hall U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX D

[LOGO]

CERTIFICATION

STATE OF FLORIDA

§

COUNTY OF ORANGE

I HEREBY CERTIFY that the foregoing is a true and correct copy of an excerpt of the Orange County Code Book as it appears in **Chapter 3**; which is on file in the office of the Comptroller Clerk of the Board of County Commissioners.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of the Board of County Commissioners, Orange County, Florida, this **19th** day of **January 1999**.

Martha O. Haynie, County Comptroller
As Clerk of the Board of County Commissioners
Orange County, Florida

By: /s/ Rosilyn M. Stapleton
Rosilyn M. Stapleton
Deputy Clerk

[SEAL]

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* * *

Adult performance establishment shall mean as follows:

(1) An establishment where a worker:

a. Engages in a private performance, acts as a private model, or displays or exposes any specified anatomical areas to a customer;

b. Wears and displays to a customer any covering, tape, pastie, or other device which simulates or otherwise gives the appearance of the display or exposure of any specified anatomical areas;

c. Offers, solicits or contracts to dance or perform with a customer in consideration for or accepts any tip, remuneration or compensation from or on behalf of that customer; or

d. Dances or performs with or within three (3) feet of a customer in consideration for or accepts any tip, remuneration or compensation from or on behalf of that customer.

(2) This definition is not intended to apply, and it is an affirmative defense to an alleged violation of this chapter regarding operating an adult performance establishment without a license, if the alleged violator demonstrates either (a) that the establishment is a bona fide private club whose membership as a whole engages in social nudism or naturalism as in a nudist resort or camp, or (b) that the predominant business or attraction of the establishment is not the offering to customers of a product, service, or entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and the establishment and its advertising is not distinguished by an emphasis on, or the promotion of, matters or persons depicting, describing, displaying, exposing, simulating or relating to specified sexual activities or specified anatomical areas.

(3) Consistent with the decision of the Supreme Court of Florida in the case of *Hoffman v. Carson*,

250 So. 2d 891, 893 (Fla. 1971), *appeal dismissed* 404 U.S. 981 (1971), an adult dancing establishment shall not be deemed a place provided or set apart for the purpose of exposing or exhibiting a person's sexual organs in a manner contrary to the first sentence of F.S. § 800.03, the state's indecent exposure statute.

* * *

Sexual gratification means the engaging in or committing of an act of sexual intercourse, oral-genital contact, masturbation, or the touching of the covered or uncovered sexual organ, pubic region, buttock, breast, chest or inner thigh of a person, any of which is for the purpose of arousing or gratifying the sexual desire of another person.

Sexual stimulation means either to excite or arouse the prurient interest or to offer, propose, solicit, or suggest to provide an act of sexual gratification to a customer, including but not limited to all conversations, statements, advertisements and acts which would lead a reasonable person to conclude that an act of sexual gratification was to be provided.

* * *